

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Digital Broadcast Content Protection	)	MM Docket No. 02-230
	)	

**Comments of  
The Recording Industry Association of America  
In Partial Support of Joint Petition for Reconsideration  
of the National Music Publishers' Association, et al.**

The Recording Industry Association of America, Inc. ("RIAA"), pursuant to Section 1.429 of the Commission's Rules, hereby submits these comments in support of the joint petition of the National Music Publishers' Association ("NMPA"), the American Society of Composers, Authors and Publishers ("ASCAP"), the Songwriters Guild of America ("SGA") and Broadcast Music, Inc. ("BMI") (collectively referred to herein as the "Joint Petitioners")<sup>1</sup> to reconsider the rules adopted in the Commission's *Report and Order* in the above-referenced proceeding that allow viewers to create CD-quality copies and to engage in Internet distribution of the audio portion of digital audiovisual programming.<sup>2</sup>

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<sup>1</sup> See Joint Petition for Reconsideration of NMPA, ASCAP, SGA, and BMI, MM Docket 02-230 (filed December 31, 2003) ("Joint Petition").

<sup>2</sup> See *In re Digital Broadcast Content Protection*, Report and Order and Further Notice of Proposed Rulemaking, MM Docket 02-230, FCC 03-273 (Nov. 4, 2003) ("*Report and Order*"). RIAA has filed similar comments in support of the Joint Petitioners' petition for reconsideration in the Commission's Plug and Play proceeding. See *In Implementation of* (Footnote continued on next page)

## **INTRODUCTION**

As the Commission is aware, the recording industry has suffered tremendously from the illegal distribution of sound recordings over the Internet. RIAA is concerned that the broadcast of music in a digital format, such as by radio or television stations, without adequate protection could become the next vehicles for rampant piracy of copyrighted sound recordings. Such piracy would impair the music industry's ability to develop new and diverse artists and music, and reduce the diversity of musical works available to the American public. Thus, rules that permit copying or redistributing of the audio portion of a high definition digital television ("DTV") broadcast in an unprotected format would create economic disincentives to the licensing of such music for use in DTV format. While each content owner will make its own, unilateral decision on licensing, the incentives against granting such licenses found in the proposed rules would tend to undermine one of the principal goals of the rules adopted in the *Report and Order*.

Accordingly, RIAA supports the Joint Petitioners' limited request for reconsideration of the Commission's decision to allow the copying and redistribution of digital-quality musical works associated with audiovisual programming. RIAA urges the Commission to eliminate the exception set forth in Section 73.9005 of its Rules, which permits consumer electronics devices to output CD-quality audio in the clear, even if the video component of the DTV content is flagged and therefore entitled to protection. Alternatively, the

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(Footnote continued from previous page)

*Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment, Second Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 97-80, PP Docket No. 00-67 (rel. Oct. 9, 2003) ("Plug and Play Proceeding").*

Commission should adopt the proposal advanced by the Joint Petitioners in their petition for reconsideration in the *Plug and Play Proceeding* and (1) preclude the redistribution of the digital audio portion of a flagged DTV program unless the audio portion is redistributed simultaneously, or synchronously, with the video portion of the program; and (2) require that, if the digital audio portion is separated from the video portion of a flagged DTV program, the audio portion may be redistributed only (a) with a flag attached that would provide an equivalent limitation on downstream uses of the audio portion as the broadcast flag offers the video portion of a DTV program and then only to devices that will give effect to such a flag, or (b) to devices that will only playback the audio portion in synchrony with the associated video portion of the program, *i.e.* to devices that will not playback the audio portion alone.

These rule changes will assure that an audiovisual program is treated as an integrated unit and that the audio portion is not separated and subject to more lax redistribution rules than the video portion. This approach will better serve the public interest than the current rules by preserving consumer expectations with respect to existing audio equipment with digital outputs while preventing the broadcast and cable media from becoming vehicles for undermining the nation's intellectual property right laws.

RIAA does not support the Joint Petitioners' request for a stay of the effective date of its rules since that could delay the DTV transition. Rather, the Commission should adopt the suggestion of the Motion Picture Association of America ("MPAA") in its petition for reconsideration in this proceeding<sup>3</sup> and make the revisions applicable to devices manufactured or imported after the effective date of the rule changes.

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<sup>3</sup> See Petition for Reconsideration and Clarification of the Motion Picture Association of America, Inc. at 20-21 (filed Jan. 2, 2004).

## **ARGUMENT**

RIAA is the trade association that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes its members' creative and financial vitality. Its members are the record companies that comprise the most vibrant national music industry in the world. RIAA members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. They also have authorized the use of their recorded music in digital music services.

RIAA members have a strong interest in protecting the intellectual property rights of music stored, distributed, broadcast or transmitted in a digital format and preventing the unauthorized sharing or distribution of sound recordings over the Internet. Unless such activities can be prevented, record companies will be unable to recoup the enormous financial investments they routinely make to bring new sound recordings to market and to develop the careers of new artists.

In furtherance of its interests in protecting digital music from unlawful copying and redistribution, RIAA submitted Reply Comments in this proceeding. In those comments, RIAA urged that any rules adopted by the Commission designed to protect DTV content should also extend to the recording industry's copyright interests in digital sound recordings aired on digital broadcasts, including audio associated with digital television video. RIAA continues to believe that that position represents sound public policy and furthers the Commission's public interest mandate while giving effect to the nation's copyright laws.

The Commission did not adopt RIAA's recommendations in its *Report and Order*. Rather, it adopted rules that afford broad protection against redistribution of the video portion of any digital television program but allow wholesale redistribution of the digital audio

portion of those programs even where the program is subject to the broadcast flag. Thus, Section 73.9005 of the new rules permits the audio portion of a flagged audiovisual work to be “output” in the clear as long as the audio material is “in compressed audio format (such as AC3) or in Linear PCM format in which the transmitted information is sampled at no more than 48 kHz and no more than 16 bits/sample.”<sup>4</sup> That provision effectively allows viewers of DTV programming to distribute over the Internet CD-quality copies of the audio portion of any DTV program.

The Joint Petitioners seek reconsideration of this result. RIAA supports that request. As noted by the Joint Petitioners, the current rules create the anomalous result that viewers cannot redistribute the video portion of flagged programming in the clear, but are free to do so with respect to the audio portion – even though the audio portion can frequently be used independently of the video, but rarely can one use the video portion without the audio.<sup>5</sup> The Commission never explained or justified this disparate treatment of the audio portion of audiovisual works. The only apparent support for this result is found in an *ex parte* letter from the MPAA filed shortly before the *Report and Order* was adopted, but which was never

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<sup>4</sup> See 47 C.F.R. § 73.9005. The section reads in full:

Except as otherwise provided in §§ 73.9003(a) or 73.9004(a), Covered Demodulator Products shall not output the audio portions of Unscreened Content or of Marked Content in digital form except in compressed audio format (such as AC3) or in Linear PCM format in which the transmitted information is sampled at no more than 48 kHz and no more than 16 bits/sample. The requirements of this section shall become applicable on July 1, 2005.

<sup>5</sup> See Joint Petition at 1. See also Joint Petition for Reconsideration of NMPA, ASCAP, SGA, and BMI, CS Docket 97-80, PP Docket No. 00-67 at 2 (filed Dec. 29, 2003).

placed on public notice or served on RIAA.<sup>6</sup> In its *ex parte* letter, MPAA, apparently responding to RIAA's Reply Comments and the comments of others, argued that precluding viewers from taking digital audio signals out of their television receivers will prevent consumers who have purchased sophisticated electronics equipment from listening to the audio portion of a television program "surround sound."

That assertion is inadequate to support the Commission's action in adopting Section 73.9005, even if the Commission had expressly relied on it in the *Report and Order*. The Commission had no data before it as to the number of these sophisticated receivers in home or whether these receivers had analog outputs that would permit high quality audio material to be heard on the receivers. Thus, the Commission had no basis for balancing the competing interests of copyright owners and the public. Moreover, as the Joint Petitioners note, the data from the Consumer Electronics Industry indicates that the number of these sets is small and most have analog outputs. Consequently, the effect of treating audio and video material in the same manner would appear to be *de minimus*, and insufficient to justify the harm to copyright holders by allowing the redistribution of audio material. Indeed, by allowing the audio portion to be redistributed in the clear, the Commission has effectively sanctioned audio piracy by leaving the digital audio portion completely unprotected and unprotectable by copyright owners.<sup>7</sup> Such a result is manifestly inconsistent with the public interest and should be revised.

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<sup>6</sup> See Letter from Fritz A. Attaway, MPAA, to Rick Chessen, FCC (Sept. 29, 2003) (discussing implications of proposed content protection rules on digital audio files).

<sup>7</sup> RIAA assumes that, by allowing the output of the digital audio material under some circumstances, the Commission did not intend to preclude manufacturers of Covered Products from affording the same protection to the audio and video portions of flagged material.

In the interest of finding a way to address our concerns given the current posture of this proceeding, RIAA proposes an alternative solution that balances the expectations of consumers who have acquired surround-sound systems and the rights of the copyright holders. Specifically, as RIAA notes in its comments in support of the Joint Petition for Reconsideration in the *Plug and Play Proceeding*, there are alternative rules that better balance these competing interests. First, the Commission should preclude products subject to the rules from outputting the digital audio portion associated with a flagged DTV program unless the audio material is distributed in synchrony with the video portion of that flagged program. This requirement would effectively require consumer electronics products receiving flagged DTV programs to give effect to the flag with respect to both the audio and visual portions of the program. Alternatively, the Commission could require that, where a device subject to the Broadcast Flag rules redistributes the digital audio portion of a flagged DTV program, the device must include a flag equivalent to the broadcast flag with the audio output from a covered product and may only send it to a device that recognizes such a flag or that is capable of playing the audio material only together with and as an integral part of the video portion of the program.

These proposals strike an appropriate balance between preserving consumer expectations and protecting the intellectual property rights of copyright owners because consumers who own “home theater” equipment will be able to use that equipment when watching an audiovisual work and listening to the digital audio output. They will even be able to tape and record in analog format any audio material, just as they do currently with respect to analog broadcasts, thereby addressing the concerns raised by the MPAA. At the same time, the proposal would recognize the interests of copyright owners to protect their

works from unauthorized distribution by preventing the audio portion of a flagged audiovisual program from being output in the clear.

By adopting this approach, the Commission will not undermine the nation's copyright laws. While the Commission's mandate is to implement national telecommunications policy, it is manifest, given the charge to regulate in the public interest, that the Commission should not, and cannot, ignore the principles underlying federal copyright law. Where communications policy objectives can be achieved without encroaching on the policies of other national law, the Commission should adopt rules that respect the policies of other federal law.<sup>8</sup>

The Joint Petitioners seek a stay of the current rules while the Commission considers their Petition. RIAA does not support that request; it recognizes the importance of the DTV transition and the Commission's extensive efforts to facilitate that transition. Staying the rules could adversely affect that transition. However, implementation of the Joint Petitioners' proposal does not require a stay; the Commission can adopt their proposal and, as suggested by MPAA in its petitions for reconsideration in this proceeding, make the new

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<sup>8</sup> *Cf. In re Dismissal of All Pending Pioneer's Preference Requests*, Order, 12 FCC Rcd. 14,006, ¶ 33 (1997):

It is settled that in reaching its public interest determination, the Commission must attempt to accommodate, to the extent possible under the Communications Act, other federal policies. See, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190, 222-23 (1943) (Commission should consider purposes of Sherman Act in administering its regulatory powers); *Storer Communications, Inc. v. FCC*, 763 F.2d 436, 443 (D.C.Cir.1985) (Commission must attempt to implement the Communications Act in a manner as consistent as possible with corporate and federal security laws' protection of shareholders' rights); *LaRose v. FCC*, 494 F.2d 1145, 1146-47 n. 2 (D.C.Cir. 1974) (Commission should endeavor to reconcile Communications Act and federal bankruptcy law).



rules applicable 18 months after those rules are adopted.<sup>9</sup> That will facilitate the transition to DTV while assuring that the holders of intellectual property rights in audio material are protected down the road from unfettered copying and distribution.

### **CONCLUSION**

For the reasons set forth above, RIAA requests that the Commission partially grant the Petition for Reconsideration filed by NMPA, ASCAP, SGA and BMI. The Commission should revise the content protection rules adopted in this proceeding to eliminate the exception that permits consumer electronics devices to output CD-quality audio in the clear. Alternatively, the Commission should revise its rules to give effect to the rule changes suggested above and by the Joint Petitioners. In order to avoid any delay of the DTV transition, the revised rules should be made applicable to devices manufactured or imported 18 months after the revised rules are adopted.

Respectfully Submitted,

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<sup>9</sup> The MPAA petition seeks reconsideration of issues not addressed by the Joint Petitioners or in these Comments.

**CERTIFICATE OF SERVICE**

I, Maureen R. Jeffreys, hereby certify that I have on this 10th day of March, 2004, served a copy of the foregoing Comments of the Recording Industry Association of America in Partial Support of Joint Petition for Reconsideration of the National Music Publishers' Association, et al. by First Class U.S. Mail, postage prepaid, to:

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